IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 19, 2008 Session

STATE OF TENNESSEE v. JIMMY LEE WHITMIRE

Direct Appeal from the Circuit Court for Marshall County
No. 17268 Robert Crigler, Judge

No. M2007-01389-CCA-R3-CD - Filed August 13, 2009

The Defendant-Appellant, Jimmy Lee Whitmire ("Whitmire"), was convicted by a Marshall County Circuit Court jury of especially aggravated kidnapping, a Class A felony; aggravated assault, a Class C felony; and aggravated burglary, a Class C felony. He received an eighteen-year sentence at one hundred percent for the especially aggravated kidnapping conviction. He also received two five-year sentences at thirty percent for the aggravated assault and aggravated burglary convictions which were to be served concurrently to the previous sentence for an effective sentence of eighteen years. On appeal, Whitmire argues the trial court erred by: (1) not declaring a mistrial, (2) not giving a curative instruction to the jury to disregard his statement to a deputy, (3) precluding testimony regarding his prior mental hospitalization, (4) excluding medical records showing his prior mental hospitalization, (5) not requiring the State to make an election of "removal" or "confinement" for the offense of especially aggravated kidnapping, (6) not sentencing him as an especially mitigated offender, and (7) improperly applying two enhancement factors and sentencing him to an effective eighteen-year sentence. Upon review, we affirm the trial court's judgments but modify the sentence for the especially aggravated kidnapping conviction to fifteen years.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed As Modified

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

G. Kerry Haymaker and David R. Heroux, Nashville, Tennessee, for the Defendant-Appellant, Jimmy Lee Whitmire.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard and Brooke Grubb, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

The victim, Lori Upton, testified that in November of 2005 she traded her car and truck for a new truck at the Nissan dealership in Shelbyville, Tennessee. At the time of this transaction, she drove her car to the dealership, and she left her truck at home. An employee at the dealership told the victim that she did not have to bring her old truck to Shelbyville the next day because they had a salesman that lived near her that could bring the truck to the dealership. The employee introduced the victim to Whitmire, the salesman who would be picking up her old truck, although the employee did not give the victim the salesman's name at the time. During the introduction, Whitmire told her that his mother and step-father, Jody and Faye Nix, lived around the corner from her. She then drove her new truck to work that day.

The next day the victim left her title and keys in the old truck so that Whitmire could take it to the dealership. As she was leaving for work, Whitmire arrived at her home. She told Whitmire about the title and keys to the truck, and she introduced Whitmire to her ex-husband, who was at her house that morning. The victim told her ex-husband that Whitmire was Jody Nix's son because her ex-husband and Jody Nix were good friends. Whitmire took the old truck and left her residence. The victim identified Whitmire for the jury as the salesman that picked up her truck that morning.

The victim stated that her home was in Cornersville, Marshall County, Tennessee. She saw Whitmire at the dealership a third time when she took her new truck back for an oil change. When she saw Whitmire in the dealership, they briefly greeted each other by saying, "Hi."

The victim stated that she encountered Whitmire a fourth time at around 3:20 a.m. on March 23, 2006. She heard a knock on her front door, and she initially thought that something had happened to her ex-husband. At the time, her daughter, age sixteen, and her son, age eighteen, were asleep in the house. She turned on the light, looked through the glass door, and saw Whitmire. She recalled wondering why Jody Nix's son was at her house in the middle of the night. When she opened the door, Whitmire said, "I am in trouble. Can I use your phone." The victim described what happened next:

> I told him [that he could use my telephone]. The phone was real[ly] close to the front door. I picked it up and handed him the phone. He kind of stepped in the house then. It was cold outside. He started dialing the number. I could smell he had been drinking, so I asked him if I could help him dial the number.
>
> Then he put his hand on my shoulder and he kind of squeezed me and shook me a little bit and somewhere he got a knife out. I guess it was in his belt or in his pocket of his coat. I don't know where he got it from. He held it out for me to see. Then I saw it. He kind of shook me and I looked. He had this knife. He told me not to scream or holler, we were going to go in my bedroom and talk for a while.

The victim testified that when she saw the knife, she thought, "I better cooperate with [Whitmire] or he was going to at least cut me." She said Whitmire started forcing her to the right side of her home, where her children's rooms were located, and she told him that her bedroom was on the left. She told Whitmire to go to her bedroom because she did not want Whitmire near her children. She said that when they walked to the left side of her house, she asked him if she could put the phone down, and Whitmire said, "Yeah." As the victim put the phone down, she "dialed 9-1-1 and . . . just put the phone down beside the receiver and [Whitmire] didn't notice that [she] didn't hang it up." When asked why she did not run out of her house when she put the phone down, the victim said, "I wasn't going to leave my kids. I was trying not to upset him until the police got there." When the victim and Whitmire went into her bedroom, Whitmire sat on her bed, and she sat on a cedar chest at the end of her bed. The victim described Whitmire's conduct at that moment:

> [Whitmire] started talking. He told me that the first time he saw me at the dealership he thought I was gorgeous and he couldn't get his mind off of me; he was rich, he could have any woman he wanted. He said he was an expert marksman; he was a professional boxer; he had worked for the CIA; he had been shot three times and stabbed three times. He said he had a problem with depression, but mostly he was just lonely.
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> He said he was – he had shamed his mother. He was ashamed that he had to move back in with his mother when he was 30. I was just trying to keep him from getting upset. I told him I was sure that his mother still loved him. He said he liked older women. He told me I might have heard that he had tried to commit suicide, but that [was] not what it was. He was defending his mother, that there was another man there, that that was how he got shot.
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> He told me he had shot or killed men in the line of duty before. He asked me what I did, what kind of work did I do. I told him I was a nurse.

The victim said that she had never told Whitmire that she was a nurse before the conversation with Whitmire in her bedroom. In fact, she said she had never told him anything about herself before that time. Then Whitmire told her that "[she] would never forgive him for this." The victim said she "wasn't sure if he was talking about what he was fixing to do or what he had done so far." She and Whitmire talked in her bedroom for about ten to fifteen minutes. She did not move away from him because she was scared. She said, "I didn't want to upset him. I didn't want him to get mad and use the knife or become forceful or whatever. I was just waiting for the cops to come." The victim said that Whitmire eventually gave her the knife:

> When he showed [the knife] to me in the living room and when we were walking in the bedroom, I didn't see it in the bedroom then. I didn't see it in the bedroom. I don't know – there were no lights on in the house. I don't know if he put it down beside him on the bed or back in his belt. I don't know where he put it. One of the times when he said [y]ou are never going to forgive me, I told him I was not

> mad at him. I think he said it again and he said, "If I give you the knife, will you throw it away?"
>
> I said, "Yes." He gave it to me. I don't know where he got it from. I took it in the kitchen and threw it in the garbage can and I went back and sat down.

The victim said that she did not leave the house when she went to throw the knife away because she did not want to leave her children and was hoping to keep Whitmire calm until law enforcement arrived. Just after she threw the knife away, she heard a knock on her front door. She jumped up, left the bedroom, and let Dep. Jolley into her house. She told Dep. Jolley that she wanted Whitmire to leave, and then Whitmire came out of the bedroom and "started telling [the deputy] a bunch of stuff like he had a problem with depression and he knew I was a nurse, so he came and talked to me." The victim said that Whitmire had just asked her what her occupation was when they were talking in her bedroom before the deputy arrived. Deputy Jolley took Whitmire outside, and when Dep. Jolley returned, the victim told him that Whitmire had a knife, and she showed him the knife in her trash can. Deputy Jolley put the knife in a plastic bag to preserve it as evidence. He then asked the victim to write down a statement of what happened. During this time, the other deputy took Whitmire to jail.

The victim said that she let Whitmire into her home because she "felt for him. He said he was in trouble and he needed to use the phone." She thought Whitmire was a good person because his step-father, Jody Nix, was a good person. The victim said that she would not have allowed Whitmire to enter her home if she had not known him or if she had seen the knife.

After they got to her bedroom, Whitmire told the victim, "Did you notice that I wiped my fingerprints off the doorknob." At the time, she was not sure what he was doing. The victim identified Whitmire as the individual that entered her house on March 23, 2006, for the jury. The knife was entered into evidence as an exhibit.

During cross-examination, the victim acknowledged that Whitmire's mother and step-father lived very near her home. She also admitted that she walked her dog in her neighborhood in her nursing uniform. Additionally, she said that she had been wearing her nursing uniform the day that she was introduced to Whitmire at the dealership.

The victim said that she believed that Whitmire was intoxicated when he arrived at her house on March 23, 2006. Although Whitmire appeared uncoordinated when he tried to use her phone, she believed that he was simply using the telephone call as a way to get into her house. She said, "He never came [to my house] to use the phone." She said that although Whitmire threatened her with the knife, he did not verbally threaten her. The victim said that she left Whitmire's presence three times – to put the telephone down while he was in her home, to throw the knife away in the kitchen, and to let the deputy into her house. However, she explained that Whitmire was only two feet away from her when she put the telephone down. She also said that she jumped up so quickly to let the deputy in that Whitmire was unable to stop her. The victim said that she did not hear

Whitmire telling one of the deputies that the knife was for him and not her. She said that Whitmire never injured her while he was in her house that night.

Tim Leonard, a 9-1-1 dispatcher for the Lewisburg Police Department, testified that at approximately 3:20 a.m. on March 23, 2006, he received a 9-1-1 call from the victim's address. Because he realized the address was outside the city's limits, he transferred the call from his 9-1-1 system to the system at the Marshall County Sheriff's Department. Even though he turned the call over to the sheriff's department, the call was being continuously recorded. Leonard identified the tape of the 9-1-1 call and stated that it was "an exact copy of what was said on the telephone." The 9-1-1 tape was made an exhibit. When Leonard transferred the call to the sheriff's department, he told Steve Young that no one said anything on the line. Leonard said that he heard no noise on the line at all.

Steve Young, a dispatcher for the Marshall County Sheriff's Department, testified that he was transferred a 9-1-1 call from Tim Leonard on March 23, 2006, at approximately 3:20 a.m. When he took the call, Young identified himself and asked about the emergency. At that point, no one responded on the other end of the line. Then Leonard told him that the caller was not responding, and Leonard hung up. Because Young did not hear a response from an individual on the line, he dispatched Dep. Jolley to the victim's address. Young said that he told Dep. Jolley that he "could hear a few random words, nothing discernable . . . just an occasional word, but nothing else on the line." He also told Dep. Jolley that he was going to stay on the line and try to get someone to respond. Young said that another deputy voluntarily went to the victim's address as well. While holding on the line, Young said he heard "just a random word here and there. There [were] no shouts or screams. I [could not] make out what they [were] saying." During the 9-1-1 call, Young said he heard Dep. Jolley come through the front door. Then he heard Dep. Jolley talking to a man in the house, but he did not know who this person was. Young asked one of the deputies to get the victim to hang up the telephone, and someone hung up the telephone. Young listened to the 9-1-1 tape recording that had been entered into evidence and said that it was an accurate depiction of what he heard during the 9-1-1 call]. The 9-1-1 tape recording was played for the jury. Young could not explain why the copy of the 9-1-1 recording played at trial kept "cutting in and out" and said that the city had the only master recording of the telephone call.

Keith Jolley, a deputy sheriff with the Marshall County Sheriff's Department, testified that he was dispatched to the victim's address as a result of a 9-1-1 call. Deputy Jolley said that Dep. Doug McBay also responded to that address. Deputy Jolley was the first to arrive at the scene, and he notified the dispatcher by radio. He noticed two vehicles in the driveway and a light on inside the home. He knocked on the front door of the victim's house. The victim answered the door and told him that there was a stranger in her house. She stepped back towards her living room, and Dep. Jolley went inside her house. Then Whitmire walked out of a bedroom door that was on his left. Deputy Jolley identified Whitmire as the individual that walked out of the victim's bedroom on March 23, 2006, for the jury. The State then questioned Dep. Jolley about his interaction with Whitmire at the victim's house:

Q. Now, Deputy Jolley, what, if anything, occurs at that point? You see Mr. Whitmire, the Defendant, in this case coming through that left bedroom door. The victim . . . has stepped back. You are where in the house at this point?

A. I am standing probably three feet from Mr. Whitmire in the living room.

. . . .

Q. So you are just a few feet from [Whitmire]. Now what takes place?

A. I asked what the problem was. I was still – all I knew at that point was there was a stranger in the house.
I asked Mr. Whitmire what he was doing.

Q. Right. This was about 3:30 in the morning?

A. Yes, sir.

Q. Okay.

A. [Whitmire] said he had come over to see her because he was a friend and he wanted to talk to her.

Q. He had come over to see her. He was a friend and he wanted to talk at 3:30 in the morning?

A. Yes, sir.

Q. Right?

Now, at that point in time did he ever mention that he had a knife?
A. No, sir.

Q. Did he ever mention to you that he came to the door with a knife?

A. No, sir.

Q. . . . Are you – were you dressed that night similarly to the way you are dressed in the courtroom this afternoon with a Marshall County Sheriff's Department uniform on and a badge?

A. Yes, sir.

The victim asked for Whitmire to leave her property, and Dep. Jolley took him outside. When Dep. McBay arrived, Dep. Jolley left Whitmire with Dep. McBay while he went inside to determine why the victim called 9-1-1. After talking with the victim, Dep. Jolley obtained the knife from the trash can in her kitchen and put it in an evidence bag. He identified the knife, which was made an exhibit at trial. Deputy Jolley then arrested Whitmire for aggravated assault.

Deputy Jolley said that the victim was not crying or screaming when he first saw her that night. He stated that it took the victim only three to four seconds to answer the door and that she appeared very nervous when he first saw her. He believed Whitmire was intoxicated that night because his eyes were red and glassy, he smelled of alcohol, and his speech was slurred. However, Whitmire was calm and peaceful at the time of his arrest. At some point during their interaction, Whitmire told Dep. Jolley that he was addicted to Lortabs.

Doug McBay, a deputy sheriff with the Marshall County Sheriff's Department, testified that he responded to a call at the victim's residence on March 23, 2006. When he arrived at the scene, Dep. Jolley and Whitmire were standing in front of the victim's house. He identified Whitmire as the individual he saw with Dep. Jolley on March 23, 2006, for the jury. Deputy Jolley asked Dep. McBay to stay with Whitmire so that he could talk to the victim. Deputy McBay talked with Whitmire a few minutes before Dep. Jolley came back and placed Whitmire under arrest. Prior to his arrest, Whitmire told Dep. McBay that "he had come to talk to the lady because she was a nurse and he had some problems." Whitmire also told Dep. McBay that "he had been injured in a shooting accident and he had some problems with prescription drugs." On the way to the jail, Whitmire asked Dep. McBay about his charges and said that "the knife was for him and not for her." When they reached the booking room at the jail, Whitmire again said that "the knife was for him and not for her and he gave her the knife." Whitmire also told him that he had drunk three beers that night. Deputy McBay stated that Whitmire was calm, easy to talk to, and followed his instructions.

Norman Dalton, a detective with the Marshall County Sheriff's Department, testified that he investigated Whitmire's case. He interviewed the victim at approximately 4:00 p.m. on March 23, 2006, which was the same day the offense occurred.

Howell Lary, the general manager of the Nissan dealership, testified on behalf of Whitmire that Whitmire was one of his top salesmen. He said that Whitmire never had any problems at work, although he did not interact with Whitmire outside of work. He admitted that the more cars Whitmire sold, the more money he made because he was paid on commission.

Frank Gardner, the sales director at the Nissan dealership, testified that Whitmire had worked for him as a salesman for the last two and a half years. He stated that Whitmire was a peaceful person who was "highly respected by all of his peers." The only thing he knew about Whitmire outside of work was that he was "very family oriented, care[d] for his brother a lot." Gardner acknowledged that he did not see Whitmire outside of work. He also admitted that he was paid a commission based on the number of cars sold by the salesmen at the dealership.

Bill Ross testified that he had been friends with Whitmire for several years. He said that he was not aware of Whitmire's attempted suicide. Ross stated that Whitmire had a reputation for being a "[v]ery upstanding guy, very easygoing." He also stated that Whitmire was "more passive than anything. I have never seen any violence come from him." Ross said that Whitmire "is probably one of my best friends that I can consult [with] or go to. If I needed anything he would give it to me." He also stated that Whitmire rented from him and they lived in the same residence. Ross said that Whitmire helped him get his job as a salesman at the Nissan dealership.

Robert Uselton testified that he was Whitmire's co-worker at the Toyota dealership. He said that Whitmire did not have a reputation for violence.

Jimmy Calahan testified that he knew Whitmire because Whitmire used to rent from him. He said that he had known Whitmire for at least five or six years and was not aware of Whitmire having a reputation for violence. Calahan said that approximately two years ago Whitmire shot himself while living in one of his trailers. He said he cleaned up the blood from the suicide attempt and stayed with Whitmire until he was airlifted to the hospital.

Jody Nix testified that he had been Whitmire's stepfather for the last seventeen years. He said that he had never known Whitmire to be aggressive. Nix said he was aware of Whitmire's suicide attempt with a shotgun in 2004 or 2005. Prior to that suicide attempt, Whitmire called his home at around 3:30 a.m. or 4:00 a.m., asked for his mother, and told Nix, "Well, I am going to do it." Nix responded, "Jimmy Lee, you don't want to do that. . . . Let me give you your mother's number at work. You can call her up there." Whitmire refused to call his mother at work, and he hung up the phone. At the time, Nix was aware that Whitmire had previously attempted suicide in Georgia. Nix then called his wife, Whitmire's mother, told her about Whitmire's suicide threat, and told her to call him. Nix discovered that Whitmire had shot himself in a suicide attempt a short time later.

Jimmy Lawson Whitmire, Whitmire's father, testified that his son had tried to commit suicide two times. He said Whitmire attempted suicide the first time by overdosing on pills when he was living in Georgia. Whitmire attempted suicide the second time by shooting himself in the shoulder and chest with a shotgun in April of 2004. Jimmy Whitmire said that he had never heard anything about his son being violent.

Whitmire elected not to testify. Defense counsel had Whitmire display his injuries from his suicide attempt with the shotgun for the jury.

Following a two-day trial, the jury convicted Whitmire of the offenses of especially aggravated kidnapping, aggravated assault, and aggravated burglary. On February 7, 2007, the trial court imposed an eighteen-year sentence for the especially aggravated kidnapping conviction and two concurrent five-year sentences for the aggravated assault and aggravated burglary convictions. On March 6, 2007, Whitmire filed a motion for a new trial. On June 6, 2007, the trial court denied this motion in a written order. Whitmire filed a timely notice of appeal to this court.

ANALYSIS

I. Mistrial. Whitmire contends that the trial court should have ordered a mistrial because of the State's failure to comply with discovery rules regarding the statement given by Whitmire to Dep. Jolley. Whitmire argues that because the statement he made to Dep. Jolley was not a gratuitous declaration but was in response to the deputy's questioning and was made under circumstances when it was clear that Dep. Jolley was a law enforcement officer, the statement was required to be disclosed under Tennessee Rule of Criminal Procedure 16. He also asserts that his statement to Dep. Jolley "affected the relative strength of the state's case by helping to establish their theory with respect to motive while, at the same time, undermining the defense's explanation of the defendant's behavior." Finally, he claims that a mistrial was necessary because the trial court failed to order a curative instruction to the jury regarding this statement.

In response, the State contends that Whitmire waived this issue because he withdrew his request for a mistrial prior to the court's ruling on this motion. See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); see also State v. Mayse, No. M2004-03077-CCA-R3-CD, 2006 WL 1132082, at *11 (Tenn. Crim. App., at Nashville, Apr. 27, 2006). In addition, the State argues that notwithstanding waiver, Whitmire has failed to show that the State violated Tennessee Rule of Criminal Procedure 16.

Rule 16(a)(1)(A) regarding discovery and inspection states:

> Defendant's Oral Statement. Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial;

Rule 16(d)(2) discusses the trial court's options if a party fails to comply with a request for discovery:

> (2) Failure to Comply with a Request. If a party fails to comply with this rule, the court may:
> (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;
> (B) grant a continuance;
> (C) prohibit the party from introducing the undisclosed evidence; or
> (D) enter such other order as it deems just under the circumstances.

When a party fails to produce discoverable material by the deadline, "the trial judge has the discretion to fashion an appropriate remedy; whether the defendant has been prejudiced by the failure to disclose is always a significant factor." State v. Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App.

1995) (citing State v. Baker, 751 S.W.2d 154, 160 (Tenn. Crim. App. 1987)). Furthermore, "the burden rests on the defense to show the degree to which the impediments to discovery hindered trial preparation and defense at trial." State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992).

The grant or denial of a motion for a mistrial rests within the sound discretion of the trial court. State v. Robinson, 146 S.W.3d 469, 494 (Tenn. 2004). A trial court should declare a mistrial "only upon a showing of manifest necessity." Id. (citing State v. Saylor, 117 S.W.3d 239, 250-51 (Tenn. 2003)). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." State v. Reid, 164 S.W.3d 286, 341-42 (Tenn. 2005) (citing State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)). This court will not reverse the trial court's denial of a motion for mistrial "absent a clear showing that the trial court abused its discretion." Robinson, 146 S.W.3d 469, 494 (citing State v. Reid, 91 S.W.3d 247, 279 (Tenn. 2002)). The party seeking a mistrial has "the burden of establishing the necessity of a mistrial." Reid, 164 S.W.3d at 342 (citing Williams, 929 S.W.2d at 388).

During trial, Dep. Jolley testified that "[Whitmire] said he had come over to see [the victim] because he was a friend and he wanted to talk to her." He also testified that Whitmire did not mention that he had a knife and did not mention that he came to the door with a knife. Immediately after this testimony, defense counsel asked to approach the bench and stated that the State never disclosed these statements through discovery. The State countered by stating that the conversation between Dep. Jolley and Whitmire was included on the 9-1-1 tape recording that was disclosed during discovery. The trial court then asked the jury to step out of the courtroom. Defense counsel made the State's discovery response an exhibit to the proceeding and then requested a mistrial. In response, the State argued:

> You could hear that conversation [between Dep. Jolley and Whitmire] on the 9-1-1 tape. So the State did give it in discovery. Whether we give it in the form of a tape or we spoon feed them and handwrite it out for them does not make any difference. All we had to do is provide them with the 9-1-1 tape and that statement is on there. That is the whole reason we played the tape [for the jury].

The defense argued that he could not understand anything on the tape recording, and the State countered that the recording was not clearly audible in the courtroom because of the faulty sound system, but it could easily be heard on a tape player. The trial court noted that aside from the motion for a mistrial, the State had filed an objection to the medical records regarding Whitmire's mental hospitalization. The court stated, "I am frankly leaning to the idea of granting a mistrial and then [the defense has its] notice about the medical records and the State [has its] notice about [Whitmire's] statement [to Dep. Jolley]." Defense counsel spoke to Whitmire. A moment later, Whitmire testified that he was directing defense counsel to withdraw the motion for a mistrial and proceed with the trial. Defense counsel stated:

> [T]hat still doesn't take care of our objection and we would ask the Court, assuming that the Court has found that there is a violation of Rule 16, we would ask the Court to instruct the jury . . . to disregard the testimony [of Dep. Jolley regarding Whitmire's statement to him] and why.

Defense counsel's Motion to Exclude Dep. Jolley's testimony was admitted into evidence as an exhibit. The trial court then asked Dep. Jolley what his response would have been to the State's question, "Did he say that he had a knife?" Deputy Jolley said that if defense counsel would not have objected, his response would have been, "No. [Whitmire] never gave me a clue that he had any weapon at all." The trial court determined that it was going to send the jury home for the night so that it could talk to counsel and decide how to handle the issue regarding Dep. Jolley's testimony about Whitmire's statement and the issue regarding the lack of notice on the medical records offered by the defense. The court indicated that it might "grant a mistrial over the objection of both parties." The State responded that double jeopardy precluded the court from granting a mistrial where neither party requested it. The trial court stated, "We are out of the presence of the jury, so I guess there is no harm in my saying frankly that the witness's response that the Defendant said they were friends and he came over to visit, is probably something the defense would want the jury to hear quite honestly." Defense counsel argued that the State's questions to Dep. Jolley regarding whether Whitmire mentioned that he had a knife or whether he mentioned that he came to the door with a knife were objectionable because the things that Whitmire did not say to Dep. Jolley were not relevant. The trial court suggested that defense counsel ask Dep. Jolley some questions outside the presence of the jury. We note that the transcript from the trial then moves immediately to the second day of trial with a continuation of Dep. Jolley's testimony in the presence of the jury. The record contains no additional information about what happened outside the presence of the jury after the first day of trial.

We agree that the State had an obligation to disclose the aforementioned statement by Whitmire to Dep. Jolley because the statement was made in response to interrogation and at a time when Whitmire knew Dep. Jolley was a law enforcement officer. See Tenn. R. Crim. P. 16(a)(1)(A). The record shows that the State claimed it disclosed Whitmire's statement to Dep. Jolley because it could be heard on the 9-1-1 tape recording, which was included in the State's response to discovery. After reviewing the 9-1-1 recording, we conclude that Whitmire's statement to Dep. Jolley that he had come over to see the victim "because he was a friend and he wanted to talk to her" is discernable, albeit barely. We conclude that if the State's failure to disclose this statement in its written response to discovery is error, then such error is harmless. See Tenn. R. App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."). We note that defense counsel requested a mistrial but then withdrew this request pursuant to Whitmire's instructions. Further, we note that Whitmire failed to show how he was prejudiced by the admission of his statement. Whitmire's statement that he had come to see the victim "because he was a friend and he wanted to talk to her" is not prejudicial and actually supports the defense theory that he came to the victim's house to seek medical help for his suicidal tendencies. In addition, Dep. Jolley's testimony that

Whitmire did not mention that he had a knife and did not mention that he came to the victim's door with a knife are not prejudicial because both the victim and Dep. Jolley testified about the existence of the knife and the knife itself was admitted into evidence. During the motion for a new trial, defense counsel argued that Whitmire's statement was problematic because it suggested to the jury that because Whitmire was untruthful about the existence of the knife, he was also untruthful about coming to the victim's house to seek mental help. However, the fact that Whitmire failed to mention the knife to Dep. Jolley initially does not create an inference that he was untruthful about his reason for coming to the victim's house. Finally, Whitmire has failed to carry his burden of establishing the necessity of a mistrial in this case. See Reid, 164 S.W.3d at 342. The admission of Whitmire's statement did not prevent him from receiving an impartial verdict in this case. See Reid, 164 S.W.3d at 341-42. The evidence at trial against Whitmire was overwhelming. Under these circumstances, we conclude that the trial court did not abuse its discretion in failing to declare a mistrial in this case. See Robinson, 146 S.W.3d at 494. Accordingly, Whitmire is not entitled to relief on this issue.

II. Curative Instruction. Whitmire also contends that the trial court's failure to give a curative instruction to the jury following the admission of his statement, despite his repeated requests for such an instruction, resulted in prejudice to him because the jury improperly considered this inadmissible evidence. Whitmire argues that it was clear to the trial court that the admission of his statement to Dep. Jolley violated Tennessee Rule of Criminal Procedure 16 because the court stated that it was considering granting a mistrial.

The State again argues that the statement was not required to be disclosed under Rule 16, that the trial court did not abuse its discretion when it allowed the statement to be admitted into evidence, and that Whitmire has failed to show how he was prejudiced by the State's failure to disclose the statement in discovery. It also argues that even if error occurred, the error was harmless beyond a reasonable doubt. In addition, the State contends that Whitmire's statement to Dep. Jolley was not given in response to interrogation, and that even if it were given in response to interrogation, it was not materially different from Whitmire's other statements that had been admitted. Finally, the State argues that Dep. Jolley's testimony that Whitmire did not mention that he had a knife or that he came to the house with a knife did not constitute a substantive statement by Whitmire, and even if this testimony did constitute a substantive statement, Whitmire had an opportunity to cross-examine Dep. Jolley about what happened when he arrived on the scene.

Based on the same reasoning we used regarding the first issue, we conclude that the trial court did not abuse its discretion in declining to give a curative instruction regarding Whitmire's statement to Dep. Jolley. If the court's failure to give a curative instruction can be considered error, then such error was harmless. See Tenn. R. App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."). Admission of Whitmire's statement to Dep. Jolley did not affect a substantial right belonging to Whitmire. As we previously stated, the evidence at trial against Whitmire was overwhelming. Accordingly, he is not entitled to relief on this issue.

III. Whitmire's Prior Mental Hospitalization. Whitmire argues that the trial court erred by precluding testimony by his father that he had visited Whitmire in a mental hospital following a failed suicide attempt. He asserts that this evidence would have supported the defense theory that he was seeking help for his suicidal tendencies, rather than committing kidnapping or assault crimes, when he entered the victim's house. He specifically notes that the offense of especially aggravated kidnapping requires a defendant to act knowingly, and he argues that the evidence of his prior mental hospitalization shows that he did not act knowingly when he committed these offenses.

In response, the State argues that Whitmire fails to show how this evidence was relevant to Whitmire's state of mind at the time that he committed these crimes. Additionally, it contends that Whitmire presented absolutely no evidence that he "had seen the victim before in the context of his hospitalization or treatment," which would have made this evidence relevant. The State further contends that Whitmire's attempt to present this evidence is "a blatant attempt to present some diminished capacity defense without an expert or properly admissible diagnosis."

This court must apply the abuse of discretion standard when reviewing a trial court's decision regarding the relevancy of evidence under Rules 401 and 402. State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997). The abuse of discretion standard is also applicable "[w]here the admissibility of the proffered evidence must also comply with Rule 404(b) and the trial court has followed the procedure mandated by that rule." Id. (internal footnote omitted). A trial court is found to have abused its discretion when it applies "an incorrect legal standard or [reaches] a decision which is illogical or unreasonable and causes an injustice to the party complaining." State v. Ruiz, 204 S.W.3d 772, 778 (Tenn. 2006) (citing Howell v. State, 185 S.W.3d 319, 337 (Tenn. 2006)).

Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Evidence which is not determined to be relevant is inadmissible. Tenn. R. Evid. 402. In addition, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. Whether evidence is relevant is a decision left to the discretion of the trial court, and this court will not will not overturn a trial court's determination regarding relevancy without a showing that the trial court abused its discretion. State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995).

The Tennessee Supreme Court has held that the exclusion of evidence can violate a defendant's due process rights when it prevents a defendant from presenting a defense:

> Exclusions of evidence may violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution even if the exclusions comply with rules of evidence. Principles of due process require that a defendant in a criminal trial have the right to present a defense and to offer testimony. See Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v.

Brown, 29 S.W.3d 427, 431 (Tenn. 2000). In Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed 2d 1019 (1967) the United State Supreme Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19, 87 S. Ct. 1920.

State v. Flood, 219 S.W.3d 307, 315-16 (Tenn. 2007). The court further stated that the following factors should be considered when determining whether the exclusion of evidence results in a due process violation: "(1) [w]hether the excluded evidence is critical to the defense; (2) [w]hether the evidence bears sufficient indicia of reliability; and (3) [w]hether the interest supporting exclusion of the evidence is substantially important." Flood, 219 S.W.3d at 316 (citing Brown, 29 S.W.3d at 434-35; State v. Rice, 184 S.W.3d 646, 673 (Tenn. 2006); State v. Rogers, 188 S.W.3d 593, 614 (Tenn. 2006)).

At trial, Jimmy Lawson Whitmire, the defendant's father, testified that Whitmire attempted suicide two times; the first suicide attempt was with an overdose of pills, and the second suicide attempt was with a shotgun. During direct examination, defense counsel asked whether Whitmire was admitted to a mental facility after these suicide attempts, and the State objected on the ground of relevancy. The trial court responded:

> I ruled you can go into the suicide attempts. The theory is that the crime was a – what happened or what allegedly happened on the date in question was a suicide attempt rather than an assault on the victim. But I allowed that but without – what I was trying to maybe inarticulately say, the details of all of this stuff are irrelevant to my thinking. If you see what I mean. I guess [it] is a way of saying you made your point.

After hearing additional arguments from counsel, the trial court stated:

> [Evidence regarding Whitmire's mental hospitalization goes] beyond the fact of showing – he has already testified as have the other witnesses. There are two suicide attempts. I have already said I am going to allow you to show the injury [from the attempted suicide with a shotgun] to the jury. [Whitmire's father] visiting [him at the mental hospital] is just not relevant, whether he visited him or not. The jury is

probably going to figure out when they see his injuries that he was in the hospital and got visited.

The trial court did not abuse its discretion in refusing to allow testimony by Whitmire's father that he had visited Whitmire in a mental hospital following a suicide attempt. The trial court allowed Whitmire's father as well as Jimmy Calahan and Jody Nix to testify about Whitmire's suicide attempts and allowed Whitmire to display his injuries from his second suicide attempt to the jury. This evidence sufficiently allowed defense counsel to present the defense theory that Whitmire's actions on the night of March 23, 2006, stemmed from his suicidal tendencies. It also allowed defense counsel to present the theory that Whitmire did not commit these offenses knowingly. The exclusion of this evidence did not violate Whitmire's due process rights. Although the evidence would have borne sufficient indicia of reliability, we conclude that it was not critical to the defense and that the interests supporting its exclusion, namely that it was not relevant, were substantially important. See Flood, 219 S.W.3d at 315-16. Because there was no reasonable connection between Whitmire's hospitalization two years prior and his actions the night of his arrest, we further conclude that the trial court did not abuse its discretion in refusing to admit this evidence on the ground that it was not relevant. See Dubose, 953 S.W.2d at 652; Tenn. R. Evid. 401, 402. Accordingly, Whitmire is not entitled to relief on this issue.

IV. Whitmire's Medical Records. Whitmire argues that the trial court erred in excluding medical records detailing his treatment following a suicide attempt approximately two years before his arrest in this case. First, he contends that the probative value of the medical records was not substantially outweighed by the danger of confusion of the issues. See Tenn. R. Evid. 403. Second, he argues that the medical records support the defense theory that he went to the victim's residence because he knew she was a nurse, and he was suicidal. Third, he asserts that the theory that he was seeking medical assistance from the victim would refute the intent element of the especially aggravated kidnapping offense. Fourth, Whitmire claims that the objective medical records would support subjective testimony from family and friends that he had attempted suicide on previous occasions. Fifth, he asserts that it was unlikely that the jury would have been confused by the medical records, considering that the facts regarding his suicide attempt two years before were significantly different from the facts relevant to this case.

In response, the State contends that Whitmire's hospitalization following a suicide attempt two years before his arrest is not relevant to his intent at the time he committed the crimes in this case. It also argues that Whitmire presented no expert medical proof regarding his mental condition at the time he entered the victim's house, and it was the jury's responsibility to determine whether he wanted the victim's help with his mental issues. Finally, the State asserts that Whitmire suffered no prejudice from the exclusion of the medical records and that admission of the records would have violated Tennessee Rule of Evidence 401.

The trial court made the following ruling regarding the issue of the admissibility of the medical records offered by the defense:

> As – the general rule is what [defense counsel] has provided us, . . . Tennessee Rule 404(b) prohibits the introduction of evidence of other crimes or acts except when the evidence of other acts is relevant to a litigated issue such as identity, intent, or rebuttal of accident or mistake. If its probative value is not outweighed by the danger of unfair prejudice.
>
> Then it goes on to say the standard for admitting evidence under Rule 404(b) is relaxed when the evidence is offered by a criminal defendant.
>
> I am going to allow the defense to put on proof of prior suicide attempts partly because I believe the standard is relaxed and they are entitled. There is a law now that the defense is entitled to put on a defense. However, I'm not going to – because – also because the shooting is brought out in the statement, I am not going to go through the three pages [of medical records] items by items.
>
> I think the risk of confusion to the jury is such since that can be proved otherwise by the defense that is marked for appeal. I respectfully – I think it just would cause more confusion. You can establish the attempted suicide and the shooting, referred to by Deputy McBay, happened, was self inflicted. Make it [clear so that] the jury doesn't think he was involved in some other criminal episode.
>
> I think I'll rule that way. In the interest of time I have got to at some point got to consider the jury. I think that is just going to be my ruling on that.

After hearing additional arguments from counsel, the trial court stated:

> I believe I am going to stick with the ruling I announced.
>
> . . . .
>
> General, just because they are arguing suicide doesn't mean that is going to prevail as a defense. I think the State in closing argument, you know, the parties argue their positions to the jury is the one that counts, not me so to speak as the ultimate decider of this thing. I think you can argue suicide is not a defense. The defense can argue, however they interpret suicide, as going to the mens rea or whatever.

As an initial matter, we note the record reflects that Whitmire and the trial court erroneously analyzed this issue under Rule 404(b) of the Tennessee Rules of Evidence. On appeal, however, Whitmire correctly argues that the medical records are admissible under Rule 403. Here, we conclude that the trial court did not abuse its discretion in refusing to admit the medical records. While Rule 404(b) requires exclusion only if "the probative value is outweighed by the danger of unfair prejudice, Rule 403 requires exclusion if the "probative value is substantially outweighed by

the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In this case, an evaluation under Rule 403 also results in inadmissibility. Here, the trial court failed to specifically determine whether the probative value of the evidence was substantially outweighed by the prejudicial nature of the evidence. However, given the trial court's concerns regarding "the risk of confusion to the jury" and the cumulative nature of the evidence, we conclude that the probative value of the medical records was substantially outweighed by the confusion of the issues and the needless presentation of cumulative evidence. Accordingly, we conclude that the trial court did not abuse its discretion in refusing to admit these medical records. See Forbes, 918 S.W.2d at 449. The records, which show Whitmire's mental health two years prior to the time of these offenses, are too remote to provide any information regarding his mental condition at the time he committed the offenses in this case. See Tenn. R. Evid. 401, 402, 403; State v. Michael Francis Garlock, No. 88-93-III, 1989 WL 12329, at *6 (Tenn. Crim. App., at Nashville, Feb. 16, 1989) (concluding that medical records showing the defendant's hospitalization due to suicidal tendencies fifteen months prior to his confession were too remote to be relevant to his mental condition at the time he gave his confession). The trial court's concern that the medical records would have been misleading and confusing to the jury was legitimate because there was no rational connection between Whitmire's medical records and his mental health at the time of the offense. See Tenn. R. Evid. 403. Because the trial court allowed Whitmire to present evidence of his prior suicide attempts and allowed him to display his injuries from a prior suicide attempt to the jury, he was able to adequately present the defense theory that he committed these offenses because he was seeking help for his suicidal tendencies. Therefore, the medical records were cumulative on this particular issue. Finally, as we previously explained, Whitmire suffered no due process violation because of the exclusion of the medical records. See Flood, 219 S.W.3d 307, 315-16. Accordingly, Whitmire is not entitled to relief on this issue.

V. Election of "Removal" or "Confinement" for the Offense of Especially Aggravated Kidnapping. Whitmire argues that the trial court erred when it overruled the defense's motion that the State make an election of "removal" or "confinement" regarding the crime of especially aggravated kidnapping. He contends that because no election was made, it is likely that some of the jurors found that Whitmire removed the victim and some of the jurors found that Whitmire confined the victim, thereby producing a non-unanimous verdict.

In response, the State contends that the doctrine of election is primarily used in the context of sex crimes against children, where the minor victims are unable to identify the precise date of the offenses. Further, citing State v. Johnson, 53 S.W.3d 628, 631 (Tenn. 2001), it asserts that an election of offenses is not required when the evidence at trial points to only one offense. Finally, the State argues that Whitmire simultaneously removed and confined the victim and because there was no proof as to multiple offenses, there is no question regarding the unanimity of the jury's verdict.

During trial, defense counsel made a motion to require the State to make an election of "removal" or "confinement" for the offense of especially aggravated kidnapping. The trial court denied the motion.

In order to properly examine the issue of election, we must consider the elements of the especially aggravated kidnapping offense. Especially aggravated kidnapping is defined as "false imprisonment, as defined in § 39-13-302: (1) Accomplished with a deadly weapon or by display or any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon[.]" T.C.A. § 39-13-305(a). The offense of especially aggravated kidnapping is a Class A felony. Id. § 39-13-305(b)(1). Tennessee Code Annotated section 39-13-302 states that "[a] person commits the offense of false imprisonment who knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty."

The Tennessee Supreme Court stressed the importance of election in State v. Adams:

> "This Court has consistently held that when the evidence indicates the defendant has committed multiple offenses against a victim, the prosecution must elect the particular offense as charged in the indictment for which the conviction is sought." State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999) (citing Tidwell v. State, 922 S.W.2d 497 (Tenn. 1996); State v. Shelton, 851 S.W.2d 134 (Tenn. 1993); Burlison v. State, 501 S.W.2d 801 (Tenn. 1973)). This election requirement serves several purposes. First, it ensures that a defendant is able to prepare for and make a defense for a specific charge. Second, election protects a defendant against double jeopardy by prohibiting retrial on the same specific charge. Third, it enables the trial court and the appellate courts to review the legal sufficiency of the evidence. The most important reason for the election requirement, however, is that it ensures that the jurors deliberate over and render a verdict on the same offense. Brown, 992 S.W.2d at 391; Burlison, 501 S.W.2d at 803. This right to a unanimous verdict has been characterized by this Court as "fundamental, immediately touching on the constitutional rights of an accused . . . ." Burlison, 501 S.W.2d at 804.

24 S.W.3d 289, 294 (Tenn. 2000). The court in Adams also outlined the situations in which an election of offenses is unnecessary:

> When the evidence does not establish that multiple offenses have been committed, however, the need to make an election never arises. To this end, this Court has made a distinction between multiple discrete acts that individually constitute separate substantive offenses and those offenses that punish a single, continuing course of conduct. In cases when the charged offense consists of a discrete act and proof is introduced of a series of acts, the state will be required to make an election. In cases when the nature of the charged offense is meant to punish a continuing course of conduct, however, election of offenses is not required because the offense is, by definition, a single offense.

Id.

In State v. Legg, the Tennessee Supreme Court specifically held that the offense of aggravated kidnapping punishes a continuing course of conduct, rather than several discrete acts:

> As evidenced by both the elements and nature of aggravated kidnapping, it is clear to us that the General Assembly intended for this offense to sanction a continuing course of conduct.
>
> As is the case with kidnapping offenses generally in Tennessee, aggravated kidnapping essentially consists of the offense of false imprisonment plus the existence of one additional element. The offense of false imprisonment was clearly intended to punish a continuing course of conduct. The very use of the terms "removes" or "confines" contemplates a continued state of being restrained. Consequently, an act of removal or confinement does not end merely upon the initial restraint, and a defendant continues to commit the crime at every moment the victim's liberty is taken.
>
> In fact, under the present statute, no period of removal or confinement is capable of being reasonably divided into multiple segments with various points of termination. Cf. State v. Rhodes, 917 S.W.2d 708, 713 (Tenn. Crim. App. 1995) (finding the offense of driving under the influence to be a continuing offense in part because it would be "impossible under the present statute reasonably to divide into more than one segment any one period of continuous driving under a continuing state of intoxication"). So long as the removal or confinement of the victim lasts, the offense of false imprisonment continues. Therefore, because the statute itself contemplates that the victim's removal or confinement is one continuous event, we conclude that the General Assembly intended for the offense of aggravated kidnapping to punish a continuing course of conduct.

9 S.W.3d 111, 117 (Tenn. 1999).

We conclude that the State had no obligation to make an election of "removal" or "confinement" for the offense of especially aggravated kidnapping. In light of the Tennessee Supreme Court's ruling in Legg, we conclude that especially aggravated kidnapping, like aggravated kidnapping, is meant to punish a continuing course of conduct. See id. Because this crime punishes a single offense, we agree with the State's assertion that the unanimity of the jury's verdict is not in question. Accordingly, Whitmire is not entitled to relief on this issue.

VI. Especially Mitigated Offender Status. Whitmire argues that the trial court erred by not sentencing him as an especially mitigated offender. He contends specifically that the trial court violated Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), when it used judicial fact finding to apply enhancement factors (7) and (10) before determining that he would not be sentenced as an especially mitigated offender. See T.C.A. § 40-35-114(7), (10). He additionally argues that the trial court erroneously determined that he could not be sentenced as an especially mitigated

offender because of its application of enhancement factor (1), "[t]he defendant had a previous criminal history in addition to that necessary to establish the appropriate range of punishment[.]" Id. § 40-35-114(1). He asserts that because his criminal history consisted of only misdemeanors, the trial court failed to follow Tennessee Code Annotated section 40-35-109(a), which allows a defendant to be sentenced as an especially mitigated offender if "[t]he court finds mitigating, but no enhancement factors" and if "[t]he defendant has no prior felony convictions."

In response, the State argues that Whitmire's offenses were committed after the effective date of the 2005 amendments to the 1989 Sentencing Reform Act, which eliminated presumptive minimum sentences and required sentences to be within the relevant range. The State also contends that the presence of any one of the enhancement factors applied by the trial court would prevent Whitmire from being sentenced as an especially mitigated offender.

Here, the trial court refused to sentence Whitmire as an especially mitigated offender because it applied the following enhancement factors: (1), "[t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;" (7), "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;" and (10), "[t]he defendant had no hesitation about committing a crime when the risk to human life was high[.]" Id. § 40-35-114(1), (7), (10). Tennessee Code Annotated section 40-35-109 defines the especially mitigated offender designation:

> (a) The court may find the defendant is an especially mitigated offender, if:
>
> (1) The defendant has no prior felony convictions; and
>
> (2) The court finds mitigating, but no enhancement factors.
>
> (b) If the court finds the defendant an especially mitigated offender, the court shall reduce the defendant's statutory Range I minimum sentence by ten percent (10%), or reduce the release eligibility date to twenty percent (20%) of the sentence, or both reductions. If the court employs both reductions, the calculation for release eligibility shall be made by first reducing the sentence and then reducing the release eligibility to twenty percent (20%).
>
> (c) If the defendant is found to be an especially mitigated offender, the judgment of conviction shall so reflect.
>
> (d) The finding that a defendant is or is not an especially mitigated offender is appealable by either party.

The Sentencing Commission Comments for section 40-35-109 state:

> If a defendant has little or no prior criminal record, such defendant would normally be sentenced within Range I as a standard offender. See § 40-35-105. However, there are instances where the trial judge may desire to depart from even the minimum sentence for a Range I offender and impose lesser penalties. In such instances, the judge may designate the defendant as an "especially mitigated offender" under the provisions of this section.

The Comments also add that "[w]hile the other types of offenders, such as multiple, persistent or career mandate sentences within their required ranges, a finding of an especially mitigated offender is discretionary with the trial court." Id. § 40-35-109, Sentencing Comm'n Comments (emphasis added); see also State v. Hicks, 868 S.W.2d 729, 730 (Tenn. Crim. App. 1993) (A trial court's determination that "an offender is especially mitigated is within the discretion of the court" while "the statutory sections pertaining to standard, multiple, persistent, and career offenders mandate those classifications."). Furthermore, the Comments state that a defendant with a prior misdemeanor record is no longer precluded from being sentenced as an especially mitigated offender. See T.C.A. § 40-35-109, Sentencing Comm'n Comments.

Whitmire argues that the trial court violated Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), because it used judicial fact finding to apply enhancement factors (7) and (10) before determining that it would not sentence him as an especially mitigated offender. See T.C.A. § 40-35-114(7), (10). On June 24, 2004, the United States Supreme Court held in Blakely that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely, 542 U.S. at 301, 124 S. Ct. at 2536 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). On June 7, 2005, after the United States Supreme Court's opinion in Blakely, the Tennessee legislature passed a new sentencing law eradicating presumptive sentences and establishing advisory sentencing guidelines. Under the new sentencing law, "the trial court 'shall consider, but is not bound by' an 'advisory sentencing guideline' that suggests an adjustment to the defendant's sentence upon the presence or absence of mitigating and enhancement factors." State v. Carter, 254 S.W.3d 335, 344 (Tenn. 2008) (quoting T.C.A. § 40-35-210(c) (2006)).

Here, Whitmire committed his offenses on March 23, 2006. The Compiler's Notes to the amended Tennessee Code Annotated section 40-35-210 (2006) state that the amended act "shall apply to sentencing for criminal offenses committed on or after June 7, 2005." Because Whitmire committed the offenses in this case after June 7, 2005, he was sentenced under the 2005 amendments to the sentencing act. As previously stated, the amended act established advisory sentencing guidelines for trial courts. Accordingly, Whitmire cannot claim that the trial court erroneously employed judicial fact finding in its application of enhancement factors because these enhancement factors under the amended sentencing act are merely advisory, not mandatory. We further acknowledge that Whitmire's criminal history, which consisted of only misdemeanor offenses, does not preclude him from qualifying as an especially mitigated offender. See T.C.A. § 40-35-109, Sentencing Comm'n Comments. However, in light of the fact that he was sentenced under the

amended sentencing act, Whitmire cannot complain that the trial court employed judicial fact finding when applying enhancement factors (7) and (10). See id. § 40-35-210 (2006), Compiler's Notes. Accordingly, he is not entitled to relief on this issue.

VII. Enhancement Factors and Sentence. Whitmire argues the trial court erred by applying enhancement factors (7) and (10) to increase the length of his sentence and to prevent his qualification as an especially mitigated offender. See id. § 40-35-114(7), (10).

Whitmire contends that the evidence at trial did not support the application of enhancement factor (7), "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement[,]" to the offense of especially aggravated kidnapping. Id. § 40-35-114(7). He contends that he "never touched, fondled, kissed or tortured her, nor did [he] demand that [the victim] act in a manner to bring about a sense of pleasure or excitement." He notes that the State did not charge him with attempted rape, and he argues that the trial court should not have applied enhancement factor (7) unless the proof showed that the motivation for pleasure or excitement was associated with the especially aggravated kidnapping offense.

Here, the trial court applied enhancement factor (7) because it "agree[d] with the State's position [regarding that factor]." Specifically, the State argued:

> The State, although we didn't get to argue it to the jury, we argued it to the Court, the State still feels like the defendant went over there to rape the lady, not to talk to her. We base that on the proof that was at trial, the things he said that day such as: I thought you were attractive or cute, however it was that he said it, the first time I saw you.
>
> Things that he said about liking older women.
>
> Things that he saw about talking to his mother and his mother recommending that he go out with her.
>
> Those are not the kind of things that you mention to a nurse when you are over there to receive psychiatric treatment.
>
> Those are the kind of things that you mention to somebody who you are trying to get to go into a bedroom for a reason with them.

Whitmire also argues that the evidence at trial did not support application of enhancement factor (10), "[t]he defendant had no hesitation about committing a crime when the risk to human life was high[,]" to the offense of especially aggravated kidnapping. Id. § 40-35-114(10). He claims that this factor should not be applied because "the high risk to human life is inherent in the offense" of especially aggravated kidnapping. In addition, he argues that there was not a risk to someone other than the victim because "[t]he record shows that the children [were] not confronted by the defendant,

that the children did not get up, and that the defendant was oblivious to [their] presence." Furthermore, he claims that the trial court did not make a finding that it was applying enhancement factor (10) because of the threat to the victim's children. Here, the trial court applied enhancement factor (10), stating that "[Whitmire] came into [the victim's] house at night with a weapon. I certainly think that [factor] applies."

In response to Whitmire's challenges to factors (7) and (10), the State contends that the 2005 amendments to the 1989 Sentencing Act prevent a defendant from arguing on appeal that the trial court improperly weighed the enhancement and mitigating factors. Quoting State v. Carter, 254 S.W.3d 335, 346 (Tenn. 2008), the State argues that "[a]n appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." It asserts that if the trial court followed the purposes and principles in the sentencing act then the sentence may not be modified by this court even if this court would have preferred a different sentence. The State also argues that the defendant has the burden of showing that a sentence is improper. T.C.A. § 40-35-401, Sentencing Comm'n Comments; State v. Goodwin, 143 S.W.3d 771, 783 (Tenn. 2004). Regarding enhancement factor (7), the State asserts that the evidence showed that Whitmire "made romantic overtures" to the victim and told her that he "liked older women" and that she "would never forgive him for this." Regarding enhancement factor (10), it asserts that Whitmire "endangered not only his intended victim but the other occupants in the house." It also argues that the sentence was proper in light of Whitmire's lengthy criminal history and the need to avoid depreciating the seriousness of his offenses. Finally, the State contends that Whitmire failed to show that he received an excessive sentence.

Here, at the sentencing hearing the trial court ruled:

> Quite frankly, Mr. Whitmire's position is inconsistent. This is not a he said/she said. There was physical evidence that a knife was found there. The victim's testimony is supported by the circumstances that she called 9-1-1; left the phone off of the hook; and the defendant was caught there by police.
>
> So this is certainly not a he said/she said. The defendant has come in here today and said I don't remember 85 percent of what happened. By the way, I did it because of mental problems and drinking. Then also says or alludes to the victim being untruthful.
>
> Those are inconsistent positions to take.
>
> At any rate, the defendant – count 1, especially aggravated kidnapping, is an A felony. The range is 15 to 25 [years] at 100 percent.
>
> The C felonies, are 3 to 6 [years], aggravated assault and aggravated burglary.

The defense has argued that I find him an especially mitigated offender. That is at 40-35-109 that says the Court may find the defendant as an especially mitigated offender if one, the defendant has no prior felony convictions; and two, the Court finds mitigating but no enhancing factors.

I am reading that to say, I think the only way you can read that, is the Court has no authority to find somebody especially mitigated unless both of those conditions are met, and even if they are both met, it is discretionary.

It is true the defendant had no prior felony convictions, but I do find enhancing factors. So therefore he would be a Range [I] Standard Offender.

Those enhancing factors are number 1:

He has a previous history of criminal convictions in addition to those necessary to establish the appropriate range.

Although I do give them the weight to which they are entitled. Two DUI's, one a second offense; and one a public intoxication.

The State has also argued number 7.

The offense involved a victim that was committed to gratify the defendant's desire for pleasure or excitement. I do agree with the State's position on that.

. . . .

That is two enhancing factors. There was one other I had been looking at.

The defendant had no hesitation about committing a crime when the risk to human life was high. I would find that would apply. He came into . . . her house at night with a weapon. I certainly think that applies.

That is three enhancing factors. There are mitigating factors, however.

One is statutory. That is as part of the especially aggravated kidnapping statute it provides that if the offender voluntarily releases the victim alive or voluntarily provides information leading to [a] victim's safe release, such action shall, shall is mandatory, [be] considered by the Court as a mitigating factor at the time of sentencing.

I find from the proof that his actions were such that he should get the benefit to some extent. Although the police did come while he was there. However, the

proof was, by the victim, that he had relinquished the knife. Had been removed to another room and they were simply talking at the time the police got there.

I actually do not place too much weight on that, but I do find it is a mitigating factor.

Also find number 8 applies.

The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense.

However, the voluntary use of intoxicants does not fall within the purview. The fact that the defendant was drinking is no mitigation whatsoever. If one chooses to voluntarily drink or take pills, that does not – that is not what I am referring to. I am referring to evidence, just to be frank, the defendant attempted suicide on a couple of prior occasions. There was much testimony about his mental condition. I also find from his testimony today that to be corroborated simply by what he said in the presentence report is indicative – has been evaluated. It doesn't rise to the level of a defense, but it is a mitigating factor.

There is no possibility of alternative sentencing. I hope for the family of the defendant who is here, there is no alternative sentencing of a sentence of an A felony. So that is not even an option for the Court. Simply a matter of setting the length of the sentence.

There are three enhancing factors and two mitigating factors.

I am going to set his sentence his sentence at 18 years as a Range I Standard Offender on especially aggravated kidnapping.

That is as required by law at 100 percent. Set five years on the agg[ravated] assault and aggravated burglary. Those all being committed at the same time will be concurrent with one another.

On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The defendant, not the State, has the burden of showing the impropriety of the sentence. T.C.A. § 40-35-401(d), Sentencing Comm'n Comments. This court has additionally held that "[a]n appellate court is . . . bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103

of the Sentencing Act." Carter, 254 S.W.3d at 346. "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails." Id. (citing State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). However, because the trial court erred in its application of enhancement factors (7) and (10) to the especially aggravated kidnapping conviction and because the trial court failed to properly consider the purposes and principles of the Sentencing Act, as outlined by sections 40-35-102 and -103, our review is de novo without a presumption of correctness. See id. at 345-46; Ashby, 823 S.W.2d at 169.

Whitmire first argues that enhancement factor (7), "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement[,]" should not have been applied in his case. T.C.A. § 40-35-114(7). In Arnett, the Tennessee Supreme Court held that "[e]ssential to proper application of [enhancement] factor [(7)] is the determination of the defendant's motive for committing the offense." State v. Arnett, 49 S.W.3d 250, 261 (Tenn. 2001) (citing State v. Kissinger, 922 S.W.2d 482, 490 (Tenn. 1996)). Facts showing a defendant's motivation may include but are not limited to "sexually explicit remarks" and "overt sexual displays made by the defendant, such as fondling or kissing a victim or otherwise behaving in a sexual manner." Id. at 262. Moreover, the court acknowledged, "[W]e emphasize that a proper application of enhancement factor (7) may indeed include situations where the evidence demonstrates that the defendant's motivation was to gratify a desire for pleasure or excitement in ways other than sex." Id. The State has the burden of proving that the offense was done to gratify a defendant's desire for pleasure or excitement. State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993), superseded, in part, by statute as stated in State v. Jackson, 60 S.W.3d 738, 741-42 (Tenn. 2001); State v. Antonio D. Mason, No. 01C01-9607-CC-00315, 1997 WL 661731, at *4 (Tenn. Crim. App., at Nashville, Oct. 24, 1997).

We conclude that the trial court erred in applying enhancement factor (7) to the especially aggravating kidnapping conviction. We note that this court has previously held that this factor can be applied to kidnapping charges. See State v. Kern, 909 S.W.2d 5, 6 (Tenn. Crim. App. 1993) (holding that the trial court appropriately applied factor (7) to the offenses of especially aggravated kidnapping and especially aggravated robbery where the defendant made several sexual remarks to the victim, kidnapped her, asked her about her sex life, and forced her to take off her clothes); State v. Kevin L. Gaskell, No. 285, 1991 WL 112275, at *6 (Tenn. Crim. App., at Knoxville, June 26, 1991) (holding that enhancement factor (7) would apply to the offense of aggravated kidnapping because "the apparent motivation for the kidnapping was the defendant's desire for sex and such a motivation does not exist in every kidnapping"). However, the record does not show that the apparent motivation for the especially aggravated kidnapping was Whitmire's desire for sex. See Gaskell, 1991 WL 112275, at *6. Therefore, we conclude that the trial court erred in applying enhancement factor (7) to the especially aggravated kidnapping conviction.

Whitmire then argues that the trial court erred in applying enhancement factor (10), "[t]he defendant had no hesitation about committing a crime when the risk to human life was high[.]"

T.C.A. § 40-35-114(10). The Tennessee Supreme Court has evaluated the application of factor (10) when individuals other than the victim are endangered by the defendant's conduct:

> The enhancement factor in Tenn. Code Ann. § 40-35-114(10) is broadly written to include "risk to human life," and it does not contain the restrictions to "the crime" and "a victim" that are contained in Tenn. Code Ann. § 40-35-114(16). Indeed, in the present case it is the "risk to human life" factor that accounts for the fact that other individuals were involved in the accident and endangered by the defendant's actions.

State v. Imfield, 70 S.W.3d 698, 707 (Tenn. 2002).

We also conclude that the trial court erred in applying enhancement factor (10) to the especially aggravated kidnapping conviction. The evidence at trial showed that Whitmire, through subterfuge, gained entry into the victim's house in the middle of the night. As the victim was trying to help him dial a telephone number, Whitmire showed her the knife, told her "not to scream or holler," and said that they were "going to go in [her] bedroom and talk for a while." At the time, the victim's teenage daughter and son were asleep in their bedrooms in the victim's home. At trial, the victim testified more than once that she refused to leave her daughter and son alone in the house with Whitmire. Despite this evidence, the record does not show that the children were in the immediate area of danger. See State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995) (Enhancement factor (10) "may be applied in situations where individuals other than the victim are in the area and are subject to injury."), abrogated on other grounds by State v. Charles Justin Osborne, No. 01C01-9806-CC-00246, 1999 WL 298220, at *3 (Tenn. Crim. App., at Nashville, May 12, 1999) (holding that "the enhancement statute does not contemplate application of factor (16) based on risk to others"). Therefore, we conclude that the trial court erred in its application of this factor to the especially aggravated kidnapping conviction.

We note that the record seems to indicate, although it is unclear, that the trial court also applied enhancement factor (10) to the aggravated burglary conviction, which is acceptable because this factor is not an essential element of the offense of aggravated burglary. See State v. James Reuben Conyers, 2003 WL 22068098, at *22 (Tenn. Crim. App., at Nashville, Sept. 5, 2003) (concluding that "enhancement factor (10) is not an essential element of aggravated burglary"). Application of factor (10) to the aggravated burglary conviction is proper because the circumstances of this case show that Whitmire entered the victim's home, displayed a knife to the victim, and forced the victim to go to her bedroom. Therefore, Whitmire, in committing the aggravated burglary, had no hesitation about committing a crime in which the risk of human life was high. Id.

Although not directly argued by Whitmire, we further conclude that the trial court erred by sentencing him to an effective sentence of eighteen years for these three convictions. In this case, the trial court applied the aforementioned three enhancement factors and two mitigating factors before imposing an eighteen-year sentence for the especially aggravated kidnapping conviction and two concurrent five-year sentences for the aggravated assault and aggravated burglary convictions.

The sentencing range for the especially aggravated kidnapping offense was fifteen to twenty-five years. See T.C.A. § 40-35-112(a)(1). The sentencing range for the aggravated assault and aggravated burglary offenses was three to six years. See id. § 40-35-112(a)(3). Upon our de novo review without a presumption of correctness and after determining that enhancement factors (7) and (10) should not have been applied to Whitmire's especially aggravated kidnapping conviction, we conclude that Whitmire's sentence should be modified to fifteen years, the minimum in the range, at 100%.

CONCLUSION

Upon review of the record, we conclude that the trial court did not err by refusing to declare a mistrial, by not giving a curative jury instruction to disregard Whitmire's statement to Dep. Jolley, by precluding testimony regarding Whitmire's prior mental hospitalization, by excluding medical records regarding Whitmire's prior hospitalization, by not requiring the State to make an election of "removal" or "confinement" for the offense of especially aggravated kidnapping, and by not sentencing Whitmire as an especially mitigated offender. After determining that the trial court erred in applying factors (7) and (10) to the especially aggravated kidnapping conviction, we conclude that it is appropriate to modify Whitmire's sentence from eighteen years to fifteen years at 100%. Upon review, the judgment of the trial court is affirmed as modified.

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CAMILLE R. McMULLEN, JUDGE